No. 88-1729



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GEORGE RODRIGUEZ,
Petitioner,

v.

COPY

DANT OF ARIZONA, and Arizona corporation,
RUDY LOPEZ and JUDY LOPEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

Atmore L. Baggot
Attorney at Law
5227 N. 7th Street, Suite 104
Phoenix, Arizona 85014-2807

(602) 279-7070
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW:

1. WHETHER SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

TABLE OF CONTENTS:

Question Presented for Review.....i.

Table of Contents.....ii.

Table of Authorities.....iii.

Opinions Below and Statement

Of Jurisdiction.....2

Relevant Constitutional

and Statutory Provisions 2-8

Statement Of The Case.....9-15

Reasons For Granting the Petition:

PROPOSITION I:

1. SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.15-30

Appendix A - Memorandum Decision of the Arizona Court of Appeals
dated 12/15/88.....A1 to A16

Appendix B - Order of Arizona Supreme Court Denying Review
dated 3/1/89.....B-1

Proof Of Service.....End

Table Of Authorities

CASES: Page

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)...25

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)...26

City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953).....23

Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956).....28

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)....18

Green v. Lindsay, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982).20

Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 865 (1946).....22

Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).....22

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).....15,16,22,25

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....16,21,26,27,30

Peralta v. Heights Medical Center, 108 S.Ct. 896 (1988).....25

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962).....22,28

Tulsa Professional Collection Services, Inc. v. Pope, __ U.S. __, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).....19

Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956).....27

Statutes:

ARS §42-393.....23
ARS §42-396(a).....23
ARS §42-421(A).....23
ARS §42-454.....25
ARS §42-461(A).....24
ARS §42-462(B).....24

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. _____

GEORGE RODRIGUEZ,
Petitioner,

v.

DANT OF ARIZONA, an Arizona corporation,
RUDY LOPEZ and JUDY LOPEZ
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

The petitioner, George Rodriguez, by and through his attorney, Atmore L. Baggot, asks that a Writ of Certiorari issue to review the judgment of the Arizona Court of Appeals in this matter.

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The decision of the Arizona Court of Appeals from which the certiorari is sought was not reported but was entered on December 15, 1988. It is attached as Appendix "A". An Order denying Petition For Review was entered by the Arizona Supreme Court on March 1, 1989, and is attached as Appendix "B". The applicable statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter concerns the Fourteenth Amendment to the Constitution which states:

United States Constitution.

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arizona Revised Statutes.

ARTICLE 8. JUDICIAL FORECLOSE OF RIGHT TO REDEEM.

ARS §42-451. Action to foreclose right to redeem; procedure.

At any time after the expiration of three years from the sale of a tax lien, if the lien is not redeemed, the purchasers, his heirs, or assigns, or the state if it is the assignee, may bring an action in a court of competent jurisdiction to foreclose the right to redeem. The provisions of law and rules of civil procedure relating to civil actions shall

control the proceedings, including the right of appeal.

Rule 4(e)(3), Arizona Rules Of Civil Procedure:

When the residence is known, the party shall on or before the date of the first publication mail a copy of the summons and complaint, postage prepaid, directed to the defendant at the defendant's place of abode...if the residency is unknown, the affidavit shall so state.

ARS §42-452. Judgment foreclosing right to redeem.

If the court in an action to foreclose the right to redeem finds the sale valid, and that the tax lien has not been redeemed, judgment shall be entered foreclosing the right of the defendant to redeem and commanding the county treasurer to execute and deliver forthwith to the party in whose favor judgment is entered.

including the state, a deed conveying the property described in the certificate of purchase. After entry of judgment the parties whose rights to redeem the tax lien are thereby foreclosed shall have no further right, title, or interest in the property, either in law or in equity, subject to the right of appeal and stay of execution as in other civil actions.

ARS §42-454. Redemption during pendency of action to foreclose.

At any time prior to entry of judgment foreclosing the right of redemption any person entitled to redeem under this article may redeem as in other cases, notwithstanding that an action has been commenced. However, if redemption is made by any person who has been served personally or by publication in the action, judgment shall be entered in favor of the plaintiff against such person for the costs incurred by the plaintiff, together with a

reasonable attorney fee to be determined by the court. When an action is brought by the state it shall be prosecuted by the county attorney, and the costs and attorney fees awarded shall be deposited in the county general fund.

ARTICLE 8.1. ADMINISTRATIVE FORECLOSE OF RIGHT OF REDEMPTION.

ARS §42-461. Application for treasurer's deed; fees and costs.

A. At any time after expiration of five years from the sale of a tax lien, if the lien is not redeemed, the purchaser or his assigns, including the state if it is the assignee, may instead of filing an action as provided by article 8 of this chapter apply for and receive a treasurer's dead to the property pursuant to this article.

B. The county treasurer, on demand of such purchaser, shall cause to be published in two consecutive weekly issues of the

official newspaper of the county a notice that the purchaser or his assigns has applied for a treasurer's deed, and that unless the property is redeemed before the date specified therein, a treasurer's deed will be executed and delivered to the purchaser or his assigns.

C. The purchaser or his assigns shall, at the time of applying for a treasurer's deed, pay to the county treasurer a fee of five dollars and the estimated costs of the title search, of publication of notice, of mailing notices by certified mail and of posting notice on the property, if applicable ....

ARS §42-462. Title search; notice of application for treasurer's deed.

A. Before delivering a treasurer's deed under this article the county treasurer shall cause a title search to be made sufficient to identify all parties with a legal or equitable interest in the

property recorded with the county recorder in the county where the property is located.

B. Not less than ninety days before the date of delivery of a treasurer's deed on a parcel of property, the county treasurer shall mail notice to the owner of the parcel as shown on the current tax roll and any other party identified in the title search conducted pursuant to section A as having a legal or equitable interest in the property. The notice shall be sent by certified mail, return receipt requested, to the person's last known address. The notice shall state that a treasurer's deed has been applied for, by whom it was applied for and a description of the property, the date the tax lien was sold and the last date for redeeming the property. ... .

STATEMENT OF THE CASE:

In 1952 Petitioner GEORGE RODRIGUEZ acquired a lot in Glendale, Arizona, which is legally described as Lot 18, La Casita Mia, at which time he was working in Phoenix for the Jackson and Perkins company. T.5. In March, 1968, he transferred to California and in 1972 he moved to 1026 Broadway, Wasco, California. T.9,10. He lived at that address with his present wife and son who is also named George Rodriguez.

On February 19, 1976, he moved to his present residence at 2234 North Third Street, Wasco, California, and resided there with his family including his son ofthe same name. T.20,25,26. In July of 1978 the son married and moved to the former family residence at 1026 Broadway in Wasco. T.61.

At approximately the time the son was getting married petitioner "was going to give him that (Glendale) lot so he would

build a house". Petitioner made arrangements for the son to pay the taxes. Petitioner received tax bills at 2234 Third Street in 1978, 1979, and 1980 and "gave them to my son so that he would pay them". T.36. However, "the taxes were confused because I trusted my son to pay them. My son did not pay them". T.31.

In 1979 the Maricopa County Treasurer struck off the lot for nonpayment of property taxes for 1979. On February 23, 1981, respondent DANT OF ARIZONA received a Certificate of Purchase from the Maricopa County Treasurer by paying the back taxes. However, petitioner continued to receive correspondence at the 2234 North Third Street address until 1986 from both the City of Glendale as well as from the Maricopa County Treasurer, notwithstanding the issuance of the Certificate Of Purchase to DANT. T. 8,10-12.

In 1984 attorney Robin W. Allen commenced an action in Maricopa County on

behalf of DANT to foreclose the redemption rights of the petitioner. In order to ascertain the location of the petitioner Mr. Allen went to the office of the Maricopa County Treasurer and discovered petitioner's former address at 1026 Broadway, Wasco, California. The record does not show why the Treasurer's records list the address on Broadway when Tax Statements were sent to the 2234 Third Street address. In order to confirm the Broadway address Mr. Allen called the telephone information operator in California and was informed that petitioner GEORGE RODRIGUEZ had a currently listed public telephone number but that the current address according to the telephonecompany was 2234 Third Street, Wasco, California, and not 1026 Broadway.

Relying upon the information provided by the telephone company Mr. Allen instructed the Kern County Sheriff's office to personally serve the defendants at 2234

Third Street in Wasco. The letter of instruction to the Sheriff is Exhibit 3 to the Deposition of Robin W. Allen (dated June 3, 1987) and states: "If the parties have moved and are not locatable locally, please so state by affidavit".

Deputy Sheriff Chris Edward Hill stated that he believed that a Hispanic female had answered the door at 2234 North Third Street on May 7, 1984, and stated that RODRIGUEZ had moved to Modesto. (Hill Depo., p.8-10). In fact, petitioner's son who had the same name as petitioner had recently moved to a town near Modesto. T.61.

No forwarding address was provided other than Modesto. The deputy wrote "Moved to Modesto" on his envelope and made no further efforts to located the defendant because "Modesto is not in Kern County". Hill Depo., p.11-13. If the deputy had not been advised that the supposed move was out of Kern county "I would have called the

phone company, maybe, for a new address, or checked the driver's license to see if they had a new address on it". (Hill Depo., p.13). Plaintiff did not make any inquiry of the Sheriff and consequently was unaware of the information provided to Sheriff Hill that the defendants had "moved to Modesto". No further efforts were made to located the defendants in Kern county or anywhere else in California. (Allen Depo., p.38-40). A further search of public records in Maricopa County revealed nothing. The only reason that further efforts were made in Maricopa County was because the defendants "had land here". (Allen Depo., p.39).

No efforts were made to investigate the address of record in the office of the Treasurer and Assessor, namely, 1026 Broadway, Wasco, California. That residence is still owned by petitioners and was rented to a close friend who "knows me for a long time" and "works for the same company where I work" and who would have

forwarded any mail or messages. T.9. In his Affidavit Re Circumstances Warranting Publication plaintiff's attorney stated:

> That he has been unable to ascertain the residence or whereabouts of the said defendants and that the same was and is unknown to him. The affiant has mailed, if any address was located, a letter with a copy of the Summons and Complaint, certified with restricted delivery and return receipt requested.

On January 29, 1985, Judgment foreclosing defendants' rights of redemption was entered by Commissioner William Topf. Not being aware of either the lawsuit or the entry of the judgment defendants-petitioner continued paying the

property taxes until 1986. T.13.

An appeal was timely taken by the petitioner RODRIGUEZ. The decisions of the state courts are attached in the appendix.

REASONS FOR GRANTING THE PETITION

I. SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

In this Court's decision in Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) it was held that the Due Process Clause requires that prior to the sale of an owner's property at a sale for delinquent taxes (which could have been later

redeemed by the owner) the owner was constitutionally entitled to actual notice. This Court squarely held:

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service...unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane.
>
> 103 S.Ct. at 2711.

The present case presents the next logical constitutional question which is suggested in Mennonite, supra, footnote 6 (103 S.Ct. at 2712) as to whether "before

the County Auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to (actual) notice of its right to redeem the property". 103 S.Ct. at 2712.

The Arizona courts brushed aside this Court's decisions in Mennonite with the simple statement that "Allen did not know an address at which Rodriguez could receive mail". (Appendix A-13). Quite obviously, however, if Allen realized that he did have such a valid address personal service could have been accomplished. The basic reason why service by publication is permitted in any situation is because the plaintiff does not have a definite address. Further, in Mennonite this Court noted in footnote 4 (103 S.Ct. at 2711) that:

> Simply mailing a letter to 'Mennonite Board of Missions, Wayne County, Ohio' quite likely would

> have provided actual notice, given 'the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed'. Grannis v. Ordean, 234 U.S. 385, 397-398, 34 S.Ct. 779, 784, 58 L.Ed. 1363 (1914).

This court should state the rule of constitutional law to be as outlined in the dissent by Judge Fidel in the Arizona Court Of Appeals:

> From the process server's return, Allen might reasonably haveconcluded that George Rodriguez had moved and left no forwarding address with the current Third Street occupant. Yet this

did not eliminate the ample possibility that the post office would forward Rodriguez's mail. Because the telephone operator had given the Third Street address as a current listing, Allen should have concluded that any move was recent. Under these circumstances, in my view, Allen could not properly rest on a failed service attempt; due diligence required the additional effort of service by mail to the last known address.

Appendix A-15,16.

Another recent "actual notice" decision is Tulsa Professional Collection Services, Inc. v. Pope, __ U.S. __, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) where this Court ruled that due process requires

actual notice to a claimant against a probate estate: "If petitioner's identity was known or "reasonably ascertainable," then termination of petitioner's claim without actual notice violated due process." 108 S.Ct. at 1348. Where "the legal proceedings themselves trigger the time bar ... due process is directly implicated and actual notice generally is required". 108 S.Ct. at 1346.

This Court also dealt with the issue of the use of the mails to provide notice in Green v. Lindsay, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) where the Court struck down a Kentucky statute allowing service by posting notice on an apartment door after only one attempt at personal service. The Court said:

> Notice by mail in the circumstances of this case would surely go a long way toward providing the

constitutionally required assurance...where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested parties with actual notice of judicial proceedings ... where an inexpensive and efficient mechanism such asmail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice reasonably calculated to reach those who could easily be informed by other means at hand." Mullane, supra, at 319, 70 S.Ct., at 659. 102 S.Ct. at 1881.

Even prior to Mennonite this Court in Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed.8659 (1946) (attempted enforcement of money judgment against ex-husband) had stated in dicta that:

> ..notice by personal or substituted service ... cannot be dispensed with even in the case of judgment in rem with respect to property within the jurisdiction of the court.
>
> 66 S.Ct. at 560.

This Court has also held that the Due Process Clause requires actual notice for termination of utility service (Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)), for condemnation proceedings (Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9L.Ed.2d 255 (1962))

and for bankruptcy proceedings which start a specific time period for creditor's claims. (City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953)).

Under Arizona law when real property is offered for sale for delinquent taxes "it shall be sold to the person who pays therefore the whole amount of the taxes, interest, penalties and then due thereon, and who in addition offers to accept the lowest rate of interest upon the amount so paid in order to redeem the property from the sale which shall not exceed ten percent per annum from the date of sale until redeemed". A.R.S. §42-393. The low bidder then receives a Certificate Of Purchase which recites the amount due by the owner in order to redeem. A.R.S. §42-396(A). The owner may then redeem his property at any time before the delivery of a treasurer's deed to the purchaser. A.R.S. §42-421(A).

In order to perfect title to property acquired at a tax sale the purchaser has two options. One option is entitled "Administrative Foreclosure of the Right Of Redemption" and allows a purchaser to aministratively apply for and receive a treasurer's deed to the property instead of filing an action §42-461(A). Prior to delivery of the deed the County Treasurer is required to "mail notice to the owner of the parcel as shown on the current tax roll...by certified mail, return receipt requested, to the person's last known address". A.R.S. §42-462(B)

The second option is the alternative statutory method, which was elected in the present case, whereby the purchase "may bring an action in a court of competent jurisdiction to foreclose the right to redeem. The provisions of law and rules of civil procedure relating to civil actions shall control the proceedings,...". An owner may redeem his property "at any time

prior to entry of judgment ... notwithstanding that an action has been commenced". A.R.S.§42-454. However, after entry of judgment foreclosing the right to redeem the owner shall have "no further right, title, or interest in the property, either in law or in equity". A.R.S. §42-452.

It should be clear that if Mennonite, supra, requires actual notice of the purchase of the tax lien at very least the same notice should be required for the ultimate blow to the owner, namely, the total extinguishment of the last vestiges of his rights in his property.

This court has recently stated in Peralta v. Heights Medical Center, 108 S.Ct. 896 (1988)(no meretorious defense requirement for default judgment without actual notice) that the failure to give notice violates "the most rudimentary demands of due process of law", quoting Armstrong v. Manzo, 380 U.S. 545, 550, 85

S.Ct. 1187,1190, 14 L.Ed.2d 62 (1965). Deprivation of property without notice is "contrary to the most basic tenets of due process". 108 S.Ct. at 9.

This Court has also ruled on the due process requirements of service by publication in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 113 (1971) where it said:

> ...service by publication...is the method of notice least calculated to brlng to a potential defendants' attention the pendency of judicial proceedings. See Mullane v. Central Hanover Bank and TrustCo., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). 91 S. Ct at 788.

The Mullane decision further stated that "process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it". 70 S.Ct. at 657. Regarding service by publication, this court approved publication only when "it is not reasonably possible or practicable to give more adequate warning . . . (and) employment of an indirect and probably futile means of notification is all that the situation permits". 70 S.Ct. at 658

In Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200 (1956) this court said "It is common knowledge that mere ne paper publication rarely informs a landowner of proceedings against his property." 77 S.Ct. at 202. "In too many instances notice by publication is no notice at all". 77 S.Ct. at 203. There, publication fell short of the requirement of due process because the name of the

landowner "was known to the City and was on the official records." "Even a letter would have apprised him that his property was about to be taken." 77 S.Ct. at 202.

In Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724 (1956) on facts very similar to the present case a landowner filed a motion to set aside a deed executed pursuant to Judgment of foreclosure of a tax lien. This Court held that even if notice is given in compliance with a statute that "the statute as applied was repugnant to the Fourteenth Amendment." 76 S.Ct. at 726

And, in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279 (1962) the court said:

> The general rule that emerges from the Mullane case is that notice by publication is not enough

> with respect to a person whose name and address are known or very easily ascertainable and who legally protected interests are directly affected by the proceedings in question. "Where the names and post office address of those affected by a proceeding are at hand the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 399 U.S. at 318, 70 S.Ct. at 659. 83 S.Ct. 2820.

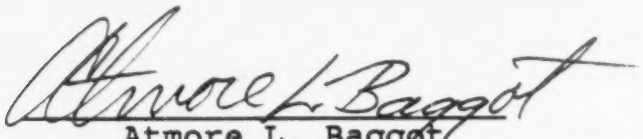
THEREFORE, petitioners were denied due process because their property was taken without notice and the default and resulting judgment must be set aside.

CONCLUSION:

Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950).

For the reasons stated, it is respectfully requested that the Petition For Writ Of Certiorari to the Arizona Court Of Appeals be granted.

DATED this 21st day of April, 1989.



Atmore L. Baggot
Attorney For Petitioner
5227 North 7th Street, Ste. 104
Phoenix, Arizona 85014-2807

(602) 279-7070

IN THE COURT OF APPEAL
STATE OF ARIZONA
DIVISION ONE

DANT OF ARIZONA, an Arizona corporation,
Plaintiff-Appellee,

RUDY LOPEZ and JUDY LOPEZ
Intervenors-Appellees,

v.

GEORGE RODRIGUEZ,
Defendant-Appellant.

No. 1 CA-CV 88-053

MEMORANDUM DECISION

AFFIRMED

EUBANK, Judge

We consider whether the trial court had jurisdiction over George Rodriguez ("Rodriguez"). Rodriguez argues that the service by publication by Dant of Arizona ("Dant"), pursuant to Rule 4(e)(3), Arizona Rules of Civil Procedure, was ineffective because his address was readily available and personal service could have been made on him.

BACKGROUND

In 1952, Rodriguez and his wife, Maria Rodriguez, purchased property in Glendale, Arizona. Until 1960, they lived on the property. Thereafter, the house on the property was torn down. In 1968, Maria Rodriguez died, Rodriguez married his present wife, Luz Rodriguez, and they moved to Wasco, California. From 1972 until 1976, Rodriguez lived at 1026 Broadway, Wasco, California. In 1976, Rodriguez moved to his present address at 2234 Third Street, Wasco, California.

Beginning in 1977, Rodriguez failed to pay property taxes on the Glendale property. In 1981, Dant paid the delinquent taxes in exchange for a Certificate of Purchase. In 1984, Dant sued to foreclose Rodriguez's right of redemption and to obtain a deed to the Glendale property.

Dant served its summons on Rodriguez by publication, stating in its affidavit

that after due search it was unable to locate Rodriguez. In January 1985, the trial court granted Dant judgment by default.

In October 1986, Rudy and Judy Lopez bought the Glendale property for $9,500. Within one year, they constructed a duplex on the Glendale property, which was then worth by their estimation between $65,000 and $70,000.

In April 1987, Rodriguez moved, under Rule 60(c), Arizona Rules of Civil Procedure, to declare Dant's judgement void for lack of jurisdiction, arguing that service by publication was ineffective. The trial court granted Rudy and Judy Lopez's motion to intervene.

The trial court held a hearing to consider Rodriguez's motion. Dant introduced evidence concerning the efforts of its attorney, Robin Allen ("Allen"), to serve Rodriguez directly. Allen searched the records of the Maricopa County

Assessor's and Treasurer's offices, which indicated that Rodriguez's address was 1026 Broadway in Wasco, California. Allen spoke to a telephone operator in Wasco, California, to confirm that Rodriguez resided at that address. He was told that Rodriguez was listed at 2234 Third Street in Wasco, California. Allen retained Chris Hill ("Hill"), who was a sergeant with the Kern County Sheriff's Department, to serve Rodriguez directly at the Third Street address. Allen requested that if Rodriguez and his first wife, Maria Rodriguez, had moved and were not locatable locally, then Hill should state that in his affidavit.

Hill testified that the woman who answered the door at the Third Street address seemed quite familiar with Rodriguez and his first wife, Maria Rodriguez. She told him that they had moved to Modesto, California, and that she could not provide a forwarding address or any other information. Hill stated that if

he had received a forwarding address, he would have listed it on his certificate. Hill returned the process, stating that Rodriguez and Maria Rodriguez had moved and their forwarding address was unknown.

Hill did not inform counsel that the Rodriguezs may have moved to Modesto.

Luz Rodriguez, Rodriguez's present wife, testified that she did not speak to Hill. However, she testified that at the time Hill attempted to serve Rodriguez, no one but she would have been at the Third Street address. She explained that Rodriguez's son, who was also named George, had moved to Huckson, a town near Modesto. Nevertheless she explained that if a Sheriff had asked after "George and Mary (sic) Macias Rodriguez" she would have known the sheriff was asking after her husband and his first wife, not her husband's son.

Allen then searched the local phone directories and the Arizona Motor Vehicle

Department records and concluded that Rodriguez had not moved back to Arizona. Thereafter, Allen served Rodriguez by publication.

The trial court denied Rodriguez's motion, finding that Allen exercised due diligence in attempting to serve Rodriguez directly before serving him by publication:

> THE COURT FINDS and ORDERS as follows:
>
> 1. On January 29, 1985, judgment was entered against Defendants Rodriguez based on service by publication. At the default hearing on that date, Commissioner Topf entered default judgment after hearing evidence and to locate Plaintiffs for personal service.
>
> 2. Plaintiff's counsel attempted to locate Defendants Rodriguez by reviewing records of Maricopa County Treasurer's and Assessor's Offices. Counsel hired the Kern County, California's Sheriff's Office to serve Defendants personally with a Summons and Complaint. The Sheriff's Office attempted to serve Defendants at 2234 Third Street, Wasco, California or anywhere within the Judicial District. Plaintiff's counsel was notified that the

attempted service was unsuccessful and the Summons and Complaint were returned with the indication that Defendants Rodriguez had moved, their forwarding address unknown. Plaintiff's attorney then checked the Motor Vehicle Department records in Maricopa County and local phone directories unsuccessfully.

3. The Court finds that Plaintiff's Counsel's efforts to locate Defendants Rodriguez were reasonable and all support a finding that due diligence was exercised in attempting to locate Defendants Rodriguez before serving them by publication.

DISCUSSION

Rodriguez argues that Dant's service by publication was ineffective under Rule 4(e)(3) because his address was readily available. See e.g., Mervyn's, Inc. v. Superior Court, 144 Ariz. 297, 300 n.4, 697 P.2d 690, 693 n.4 (1985) ("Notice by publication is permitted in quasi in rem and in rem proceedings where the party's address is unknown"); Omega II Inv. Co. v. McLeod, 153 Ariz. 231, 342, 736, P.2d 824, 825 (App. 1987) (Plaintiff did not show

due diligence when it only reviewed Casa Grande City directory and area telephone company records, and not the Pinal County Recorder's records which listed defendant's Michigan address); see also Donel, Inc. v. Badalian, 87 Cal. App. 3d 327, 333-34, 150 Cal. Rptr. 855, 859 (1978) (plaintiff did not show due diligence when he only reviewed telephone directories and he did not even ask defendant's attorney with whom he had extensive correspondence); Emanuel v. Fellows, 47 N.C. App. 340, 267 S.E.2d. 368, 371 (1980) (plaintiff showed due diligence when, upon learning that personal service was unsuccessful, he called the number listed as defendant's telephone number and he called the directory assistance operator); Miller v. Wenexco, Inc., 743 p.2d 152, 156 (Okla. 1987) ("Primary sources at hand, such as local tax rolls, deed records, judicial records and other official records, as

well as available secondary sources, such as telephone directory, a city directory or the like must be exhausted"). Rodriguez suggests that Allen could have contacted the telephone information operator in Modesto. However, there is no evidence that counsel was aware that the Rodriguezs might be in Modesto. Rodriguez also suggests that Allen could have made additional inquiries, based on the apparent conflict between the telephone operator in Wasco, who listed Rodriguez at the Third Street address, and Hill's affidavit, which stated that Rodriguez's address was unknown.

It is possible that if Allen had followed all of Rodriguez's suggestions, he might have been able to serve Rodriguez directly. However, Allen was not required to do "extensive detective work into the whereabouts of strangers." Preston v. Denkins, 94 Ariz. 214, 223, 382 P.2d 686, 692 (1963). Nor is there a formula or

checklist that constitutes due diligence. See Donel, 87 Cal. App. 3d at 329, 150 Cal. Rptr. at 856; Emanuel, 267 S.E.2d at 372. We conclude that Dant exercised due diligence in attempting direct service: Allen found Rodriguez's Third Street address by reviewing telephone directories, Department of Motor Vehicle records, and County Treasurer's and Assessor's records and by speaking to a telephone operator in Wasco, California; and Allen attempted direct service at that address.

Rodriguez argues that the facts in this case are very similar to the facts in Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L.Ed. 1021 (1956). There is no similarity. In Covey, the plaintiff gave notice to the defendant by mail and by posting, although it knew that defendant was incompetent. The Supreme Court stated that the notice was merely a gesture and violated the Due Process

Clause of the Fourteenth Amendment. 351 U.S. at 146-47, 76 S.Ct. at 727, 100 L.Ed. at 1026. The Supreme Court did not state that service by publication in other circumstances would violate due process.

Rodriguez argues that Allen should have made more than one attempt at personal service, based on Duron v. Fleischman, 156 Ariz. 189, 751 P.2d 39 (App. 1988). In Duron, the defendant upon arrest gave as his address a post office box outside Pima County. 156 Ariz. at 190, 751 P.2d at 40. The Pima County Sheriff was unable to effect direct service at that address either because the sheriff did not have authority to serve process outside Pima County or because the address was a post office box. Id. The defendant offered proof that he could have been notified either through his counsel of record or by mail sent to his post office box. 156 Ariz. at 192, 751 P.2d at 42. The court held that the state had not

exercised due diligence in locating the defendant.

Rodriguez also argues that Allen should have asked Rodriguez's tenant who was staying at the Broadway address in Wasco, based on Lown v. Miranda, 34 Ariz. 32, 267 P.418 (1928). In Lown, the plaintiffs did not ask the tenants occupying the property which was the subject of the action about their landlord's address. 34 Ariz. at 37, 267 P. at 420. The court held that the plaintiffs did not show due diligence in locating defendant. Id.

We distinguish Duran and Lown. Allen was told by a Wasco telephone operator that Rodriguez's address was the Third Street address, not the Broadway address. Then he was told that Rodriguez had moved and his address was unknown. There was no evidence that, thereafter, Allen should have known that Rodriguez still lived at the Third Street address or that Rodriguez

still owned the house at the Broadway address.

Rodriguez also argues the Dant's service by publication was ineffective under the Due Process clause of the Fourteenth Amendment because Dant did not mail the summons to his Third Street address. See e.g., Tulsa Professional Collection Services, Inc. v. Pope, U.S. 108 S.Ct. 1340, 1347, 99 L.Ed.2d 565 (1988) (if an estate creditor's identity is known or reasonably ascertainable, notice by mail, not merely publication notice, was required); Mennonite Board of Missions v. Adams, 462 U.S. 791, 799, 103 S.Ct. 2706, 2711, 77 L.Ed.2d 180, 188 (1983) (mortgagees must be given notice of a pending tax sale by either personal service or mail notice, not merely by posting and publication); Greene v. Lindsey, 456 U.S. 444, 455-56, 102 S.Ct. 1874, 1880-81, 72 L.Ed.2d 249, 258-59 (1982) (statutory requirement permitting

notice by posting on the apartment doors of tenants in a public housing project after one attempt at personal service did not afford adequate notice when compared to the alternative of inexpensive, reasonably reliable mail notice).

We recognize that the Supreme Court has, in certain circumstances, concluded that mail service is an inexpensive, efficient mechanism reasonably calculated to provide actual notice, within the meaning of the Due Process Clause. Indeed Rule 4(e)(3) provides that if the defendant's residence is known, the plaintiff should mail a copy of the summons and complaint to the defendant at his residence. However, this authority does not apply to Dant's service. Allen did not know an address at which Rodriguez could receive mail.

CONCLUSION

We deny Dant's request for attorneys' fees on appeal because Dant has failed to indicate any statutory authorization for awarding such fees. Further, we deny Rodriguez's request for attorneys' fees in the trial court and on appeal. We affirm the trial court's order denying Rodriguez's request to declare the judgement void.

William E. Eubank, Judge

CONCURRING:

Fidel, Presiding Judge, dissenting:

I respectfully dissent from the majority's conclusion that mailing was unnecessary. From a telephone operator in Wasco, Allen was given Rodriguez's current, Third Street address. Though he attempted personal service unsuccessfully, this did not exhaust the requisites of

diligence. From the process server's return, Allen might reasonably have concluded that George Rodriguez had moved and left no forwarding address with the current Third Street occupant. Yet this did not eliminate the ample possibility that the post office would forward Rodriguez's mail. Because the telephone operator had given the Third Street address as a current listing, Allen should have concluded that any move was recent. Under these circumstances, in my view, Allen could not properly rest on a failed service attempt; due diligence required the additional effort of service by mail to the last known address.

SUPREME COURT
STATE OF ARIZONA

March 1, 1989

RE: DANT OF ARIZONA/RUDY LOPEZ-JUDY LOPEZ
vs. GEORGE RODRIGUEZ
Supreme Court No. CV-89-0028-PR
Court of Appeals No. 1 CA-CV 88-053
Maricopa County No. C-510165

GREETINGS:

The following action was taken by the Supreme Court of the State Of Arizona on February 28, 1989, in regard to the above-referenced cause:

ORDERED: Petition For Review = DENIED.

Vice Chief Justice Feldman did not participate in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 1st day of March, 1989.

NOEL K. DESSAINT, Clerk

APPENDIX B

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

ATMORE L. BAGGOT, being first duly sworn, upon his oath deposes and says: That he is a member of this Court, a citizen of the United States, and a resident of the county aforesaid; that he is over the age of eighteen years and is not a party to the within above-entitled action; that on the 21st day of April, 1989, he mailed the within Petition for Writ of Certiorari on the parties in said action, by placing a true copy thereof in an envelope, sealed, and postage thereon fully prepaid, in the United States mail at Phoenix, Arizona, addressed as follows:

Mr. Jack D. Klausner, Esq.
Ms. Marigene Dessaint, Esq.
702 East Osborn Rd., Ste. 200
Phoenix, Arizona 85014

Mr. Robert W. Allen, Esq.
20 East Main, Ste. 785
Mesa. Arizona 85201

Atmore L. Baggot

SUBSCRIBED AND SWORN TO before me this 21st day of April, 1989.

My commission expires: 8/25/90

Notary Public

OFFICIAL SEAL
CHERYL M. NELSON
Notary Public Arizona
Principal Offices in
Maricopa County
My Commission Expires Aug. 25, 1990